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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGEAL ANTHONY STONUM,

Defendant and Appellant.

E034297

(Super.Ct.No. SWF3435)

OPINION

APPEAL from the Superior Court of Riverside County. Rodney L. Walker,
Judge. Affirmed.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez,
Supervising Deputy Attorney General, David Delgado-Rucci and Warren P. Robinson,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of: (1) inflicting corporal injury upon Lorena V. (the victim) under Penal Code section 273.5, subdivision (a) (count 1); and (2) making a terrorist threat against the victim under Penal Code section 422 (count 2). Defendant admitted a prior serious felony conviction under Penal Code section 667, subdivision (a), and a serious or violent felony conviction under Penal Code sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). The court sentenced defendant to 14 years, 4 months in state prison. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Current Offenses*

On the morning of March 31, 2003, the victim placed a 911 telephone call from a neighbor's home. The victim, who was crying, stated that defendant, who was her boyfriend, had beaten her even though she was three months pregnant. The victim stated that defendant was on parole for domestic violence and terrorist threats. The victim told the dispatcher that, as she was making the call, defendant was using a knife to puncture the tires of her car.

About 9:00 a.m., 14 minutes after the victim placed the 911 telephone call, a sheriff's deputy responded. The victim was crying and shaking. As the deputy spoke to the victim, she kept looking around. She stated that she was pregnant and that she and defendant, who was the father of her expected child, had argued about the pregnancy. The victim and defendant had been living together for approximately three months.

The victim further stated that defendant had hit her on the left side of her chest with a closed fist, pushed her to the ground, and then kicked her in the stomach numerous times. Defendant told her to stand up or he would “stomp” on her. The victim managed to stand up and began to walk out of the house.

As the victim was leaving the house, defendant punched her in the back of the head. Defendant then told the victim, “Go ahead and leave bitch. I will find you and kill you.” The victim ran to the next-door neighbor’s home and called the police.

The victim told the deputy that as she was speaking to the 911 dispatcher defendant used a knife to puncture a tire of her car. Defendant then ran across the street to the home of his friend and left with the friend in his car. The deputy observed that one of the rear tires of the victim’s car was flat.

The deputy saw a fresh, red, egg-shaped bruise, which was about three to four inches long, on the left side of the victim’s chest. The victim stated that the mark had been caused when defendant punched her in the chest. The deputy also saw a fresh, red bruise on the victim’s back. The victim explained that defendant had caused that bruise by hitting her. The victim pulled back her hair and allowed the deputy to feel the back of her head. The deputy felt a bump about the size of a quarter. The victim stated that defendant had caused that injury when he punched her in the head as she was trying to leave the house.

The victim, who appeared to be afraid throughout the interview, continued to look around, especially toward the house to which she had seen defendant run. The victim

told the deputy that defendant had physically abused her on five prior occasions, including forcing her to engage in sex four days earlier.

On June 20, 2003, an investigator for the Riverside County District Attorney's Office contacted the victim while she was in jail for failure to appear. The victim told the investigator that, before defendant raped her on March 27, he grabbed the back of her shirt as she tried to get off the bed and ripped the two straps off the shirt. Defendant then grabbed her and pulled her back on the bed. The victim told defendant that if he forced her to have sex with him, it would constitute rape. The victim said that she kicked defendant in the testicles. During the incident, the victim was afraid that defendant would kill her.

The victim did not want to testify against defendant. The victim had been arrested for failing to obey a subpoena to appear in court in an earlier proceeding against defendant. The victim testified that her statements to the police that defendant had hit her and threatened her were lies.

B. Prior Domestic Violence Incidents

Z.A. testified that she and defendant dated for almost three years. During the relationship, defendant regularly committed acts of physical violence against Z.A., such as slapping her on the side of the head, punching her in the chest, pinching her, biting her, and scratching her. On one occasion, defendant held a box cutter to Z.A.'s neck and threatened to hurt her with it. Thereafter, defendant proceeded to engage in sex with Z.A., even though she told defendant that she did not want to have sex. Z.A. cried during

the act of intercourse. The next day, defendant threatened to kill Z.A. unless she moved out of town.

II

DISCUSSION

A. *Sufficiency of Evidence of Terrorist Threats*

Defendant contends his conviction for making terrorist threats in violation of Penal Code section 422 is not supported by substantial evidence.

1. *Standard of review*

In determining whether a conviction is supported by substantial evidence, an appellate court “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court’s findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.]” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Reversal is proper only if it appears “that upon no hypothesis whatever” is there sufficient evidence to support the factfinder’s conclusions. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

2. *Analysis*

“In order to establish a [Penal Code] section 422 violation, the prosecution must establish (1) that the defendant had the specific intent that his statement would be taken as a threat (whether or not he actually intended to carry the threat out), and (2) that the

victim was in a state of ‘sustained fear.’ The prosecution must additionally show that the nature of the threat, both on ‘its face and under the circumstances in which it is made,’ was such as to convey to the victim an immediate prospect of execution of the threat and to render the victim’s fear reasonable.” (*People v. Garrett* (1994) 30 Cal.App.4th 962, 966-967.)

Defendant argues there was no evidence of any causal connection between his threat to kill the victim and any sustained fear on her part. Rather, she merely was afraid of defendant in general or afraid of additional violent acts because of his earlier physical assault. He notes that the day after the death threat, the victim voluntarily came to his mother’s house to try to find a paper she needed to get an abortion and while there spoke with defendant, negating any inference the threat caused sustained fear.

Defendant’s argument is not persuasive. The evidence supported a reasonable inference that the death threat caused at least sufficient fear to satisfy Penal Code section 422.

In *People v. Allen* (1995) 33 Cal.App.4th 1149 (*Allen*), after the defendant and a woman ended their dating relationship, he went to her mother’s house and threatened to throw a bomb at it. Several months later, after going by the mother’s house several times, the defendant went to the door, pointed a gun at her, and threatened to kill her and her daughter. The mother telephoned the police, who arrested the defendant about 15 minutes later. (*Id.* at pp. 1152-1153.)

The defendant contended that, because the police arrested him promptly, his death threat did not cause the victim to suffer sustained fear. The court disagreed. It noted that all that was necessary to satisfy Penal Code section 422 was that the threat cause the victim to suffer fear “that extends beyond what is momentary, fleeting, or transitory.” In deciding that question, the jury may consider the defendant’s past conduct as well as the circumstances of the threat itself. The court concluded: “Fifteen minutes of fear of a defendant who is armed, mobile, and at large, and who has threatened to kill the victim and her daughter, is more than sufficient to constitute ‘sustained’ fear for purposes of this element of section 422.” (*Allen, supra*, 33 Cal.App.4th 1149, 1156, fn. omitted.)

In this case, when the deputy contacted the victim after she called 911, the victim stated that defendant had threatened to kill her, punctured her tire, and left the scene in a car. He was still “mobile, and at large,” and fully capable of returning to carry out his threat for at least the 14 minutes until the deputy responded. Throughout the interview, the victim was crying and shaking, appeared to be afraid, and continued to look toward the house to which defendant had run. Defendant had physically abused her in the past.

Under *Allen*, this evidence was sufficient to support a reasonable inference that the death threat caused the victim to suffer sustained fear. The victim’s contacts with defendant after the day of the incident -- i.e., after she had already called the authorities on him -- did not preclude the jury from reasonably inferring the threat caused her to experience sustained fear on the day of the incident. Accordingly, viewing the record most favorably to the People, there was sufficient evidence to support the verdict.

B. *Admission of Evidence of Prior Sexual Assaults*

Defendant contends the trial court erred in admitting evidence of prior sexual assaults he committed against the victim and Z.A. under Evidence Code sections 1109 and 352.

1. *Evidence Code Section 1109*

Under Evidence Code section 1109, subdivision (a)(1), “in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by [Evidence Code] [s]ection 1101 if the evidence is not inadmissible pursuant to [Evidence Code] [s]ection 352.” Section 1109 further provides: “As used in this section, ‘domestic violence’ has the meaning set forth in Section 13700 of the Penal Code.” (§ 1109, subd. (d).)

Penal Code section 13700 provides in relevant part: “‘Domestic violence’ means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.” (*Id.*, subd. (b).) Section 13700 also provides: “‘Abuse’ means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.” (*Id.*, subd. (a).) Thus, for a crime to involve “domestic violence” for purposes of Evidence Code section 1109, it must either involve actual or

attempted bodily injury or must involve placing the victim in reasonable apprehension of imminent serious bodily injury.

Defendant contends it was not shown in this case that the prior sexual offenses involved actual or attempted bodily injury on Z.A. and the victim or conduct placing them in reasonable apprehension of imminent serious bodily injury. Though both women characterized the prior offenses as rape, defendant argues rape does not necessarily involve actual or threatened bodily injury.

At the outset, we note the inconsistency between defendant's assertion that the prior conduct did not involve "domestic violence" and his assertion, elsewhere in his brief, that the prior incidents were "violent," "egregious," and "shocking," so much so that their admission was barred by Evidence Code section 352. Putting that inconsistency aside, we conclude defendant's argument that the prior rapes did not involve domestic violence is contrary to case law.

In *People v. Poplar* (1999) 70 Cal.App.4th 1129, the court held the defendant's commission of rape involved domestic violence: "The definition of domestic violence/abuse ('reasonable apprehension of imminent serious bodily injury to . . . herself') encompasses the definition of rape ('fear of immediate and unlawful bodily injury on the person'). Defendant was charged with an offense involving domestic violence, that is, rape. As the prosecutor argued, rape is a higher level of domestic violence, a similar act of control." (*Id.* at p. 1139.) The court rejected the defendant's argument that Evidence Code section 1109 and Penal Code section 13700 "refer to the

classic kind of pushing, shoving, hitting, slapping, punching’ and not to ‘a specific sexual offense such as rape.’” (*Poplar*, at p. 1138; see also *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1331 [citing *Poplar* for the proposition that “spousal rape is a form of domestic violence”].)

Defendant argues these decisions are wrong, because rape can be committed without actual or threatened bodily injury, as where the victim is intoxicated, is unconscious, or consents due to fraud. (See Pen. Code, § 261, subd. (a).) Although that may be true in the abstract, we are not aware of any authority holding that an offense must, in all its possible permutations, involve actual or threatened bodily injury in order to qualify as conduct involving domestic violence for purposes of Evidence Code section 1109. Rather, the more sensible approach is that used in *Poplar*, where the court looked to the facts of the rape as committed in that case.

Here, according to the victim, four days before her 911 call defendant ripped off her victim’s clothes, pulled her panties off, and forced her to have sex with him. The investigator from the district attorney’s office testified that the victim told him that defendant had raped her. The victim told the investigator that defendant grabbed the back of her shirt as she tried to get off the bed, which caused the straps of her shirt to rip, and then pulled her back on the bed. The victim was afraid defendant would *kill her*. The court reasonably could conclude this conduct involved “causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent

serious bodily injury” (Pen. Code, § 13700, subd. (a)) and thus involved domestic violence.

Z.A. testified that defendant had engaged in sex with her even though she did not want to do so, and she cried during intercourse. Shortly before engaging in sex with Z.A., defendant had held a box cutter to her neck and *threatened to hurt her* with it. Again, the court reasonably could conclude this conduct involved “placing another person in reasonable apprehension of imminent serious bodily injury.”

A trial court’s admission of evidence under Evidence Code section 1109 will not be disturbed absent a showing of abuse of discretion. (*People v. Poplar, supra*, 70 Cal.App.4th 1129, 1138.) For the reasons stated, the court’s admission of the prior incidents as involving domestic violence was reasonable. There was no abuse of discretion.

2. *Evidence Code Section 352*

Second, defendant contends the trial court erred in admitting evidence of the sexual assaults under Evidence Code section 352, which gives the trial court the discretion to exclude evidence when its probative value is substantially outweighed by the probability it will cause undue prejudice, consume undue time, or confuse the jury. A trial court’s exercise of discretion under section 352 will only be disturbed if it was arbitrary, capricious, or patently absurd. (*People v. Frye* (1998) 18 Cal.4th 894, 948.)

Before admitting evidence under Evidence Code section 1109, the trial court must engage in a careful weighing process under Evidence Code section 352. The record

reflects the trial court did so and appropriately determined that the probative value outweighed any likely prejudicial effects. The court noted as follows:

“So, although I agree with you that a jury may take a more dim view of someone who has recently sexually assaulted the same victim, and someone who has recently simply physically assaulted, battered the same victim, because of the emotional impact of rape or sexual assault evidence, I am not so sure that necessarily leads us to the conclusion that because the evidence is probably more prejudicial, then it should be excluded under [Evidence Code section] 352 because it is more prejudicial than probative. ¶ . . . ¶

“Is [the evidence] so prejudicial that the defendant is in danger of being deprived of his right to have a fair trial? I don’t think so.

“I think, coupled with the fact that we are going to talk about something similar happening to another girlfriend of the defendant’s, and in line with the fact that [Evidence Code section] 1109[, subdivision] (b) not only allows introduction of propensity evidence but almost seems to encourage it, I think what we are going to -- will have to be allowed under the law is that the defendant takes a certain attitude with respect to his -- that is manifested in physical assault and sexual assaults, and it is an ongoing pattern, and that is what propensity evidence is all about.”

Based on the above, we cannot say that the trial court’s ruling was arbitrary, capricious or patently absurd. “““The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the

defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.]’ [Citation.]” (*People v. Poplar, supra*, 70 Cal.App.4th at p. 1138, citing *People v. Karis* (1988) 46 Cal.3d 612, 638.) As stated above, “[t]he admissibility of evidence of domestic violence is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of discretion.” (*Poplar*, at p. 1138.)

Here, the evidence was highly probative in showing defendant’s disposition to commit acts of domestic violence. Nevertheless, defendant argues that the prior instances of rape were more serious than, and dissimilar to, the current charges. In support of his argument, he relies on *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), where the admission of prior acts evidence under Evidence Code section 1108 resulted in a reversal.

In *Harris*, the court held that evidence of a 23-year-old violent sexual offense should have been excluded from the defendant’s trial for two very factually distinct sexual offenses. The defendant was a mental health nurse who was charged with committing sex offenses upon two women confined in the treatment center where he worked. (*Harris, supra*, 60 Cal.App.4th at pp. 730-732.) Only a minimal amount of violence was involved in committing the charged offenses. (*Ibid.*)

However, 23 years prior to the charged offenses, the defendant had committed a vicious attack on a female tenant where he was an assistant manager of an apartment complex. The defendant entered the victim’s apartment at night and beat the victim

unconscious. The defendant then used a sharp instrument to tear open her vagina and stabbed her in the chest with an ice pick. (*Harris, supra*, 60 Cal.App.4th at p. 733.)

The *Harris* court noted that the facts of the prior offense were shocking and inflammatory, in contrast to the charged offenses. (*Harris, supra*, 60 Cal.App.4th at pp. 737-738.) The prior offense was also very remote in time to the charged offenses, because the defendant had not engaged in any sexual offenses during the ensuing 23 years. (*Id.* at p. 739.) The court reasoned that the prior offense therefore had no tendency in reason to prove or disprove the current charges. (*Id.* at p. 740.) Moreover, the court noted that evidence of the prior violent attack was “nearly irrelevant” to the charged offenses as it did not tend to show that the defendant committed the charged “breach of trust” sex crimes. (*Id.* at pp. 740-741.)

This case is readily distinguishable from *Harris*. Here, defendant’s prior offenses were much less inflammatory than the prior offenses admitted in *Harris*. Although the prior uncharged offenses admitted in defendant’s case were rapes, they were not as brutally violent or egregious as the rape in *Harris*. Further, the current offenses did not involve minimal violence, as in *Harris*, but instead resulted in noticeable bruises on the victim’s chest and back and a bump on her head and also involved a threat to kill her.

Moreover, unlike *Harris*, in this case defendant’s prior acts showed his propensity to abuse his current girlfriends, not strangers. Additionally, the prior acts were not remote in time (i.e., 23 years), as the prior act in *Harris*. Therefore, defendant’s reliance on *Harris* is misplaced.

Based on the above, we hold the trial court did not abuse its discretion under Evidence Code section 352 in admitting evidence regarding the prior acts of domestic violence.

C. *Due Process*

Defendant contends that even if the trial court's admission of the prior incidents of domestic violence was proper under Evidence Code sections 1109 and 352, it was still erroneous because admission of propensity evidence violates due process. As defendant acknowledges, his argument was rejected by the California Supreme Court in the context of prior sexual offenses under the analogous Evidence Code section 1108 in *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922 (*Falsetta*). The argument also was rejected with respect to section 1109 in *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*). Relying on *Falsetta*, the court in *Reliford* stated: "A jury may use 'the evidence of prior sex crimes to find that defendant had a propensity to commit such crimes, which in turn may show that he committed the charged offenses.' (*Falsetta, supra*, 21 Cal.4th at p. 923; *id.* at p. 920 ['evidence of a defendant's other sex offenses constitutes relevant circumstantial evidence that he committed the charged sex offenses'].)" (*Reliford*, at p. 1013; accord, *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1029.)

Defendant acknowledges we must follow these decisions but wishes to preserve his argument for federal review. Accordingly, we reject the argument.

D. *CALJIC No. 2.04*

Defendant contends the trial court erred in instructing the jury with CALJIC No. 2.04 (efforts by defendant to fabricate evidence). The court instructed:

“If you find that the defendant attempted to or did persuade a witness to testify falsely or fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.”

In overruling defendant’s objection, the court noted that the victim had testified she had contacted defendant numerous times when he was in jail and had exchanged letters with him. The court stated that, although the victim had stated she never discussed the facts of the case with defendant, later evidence suggested she had done so. The court concluded that the jury could find that defendant attempted to persuade the victim not to testify against him.

As the court indicated, the victim testified that after defendant’s arrest she visited him in jail several times, talked with him on the telephone, wrote him about 30 letters, and received 30 to 40 letters from him. Interestingly, although the victim initially testified that defendant never told her to lie in court on his behalf, she later testified that she *did not remember* his asking her to do so before testifying again. Defendant did tell the victim how much prison time he was facing.

Defendant, in fact, concedes that the victim's testimony may have lacked credibility. We agree. In view of the fact the victim in her testimony claimed her statements to the police that defendant had hit her and threatened her were lies, a credibility issue was squarely presented, and the jury was entitled to find the victim lied on the stand. That being the case, the jury also was free to reject her claim on the stand that defendant did not ask her to give false exonerating testimony.

Defendant notes there was no *direct* evidence he tried to or did persuade the victim to testify falsely. Of course, there did not have to be. "Circumstantial evidence is as sufficient to convict as direct evidence. [Citations.]" (*People v. Reed* (1952) 38 Cal.2d 423, 431.) The circumstantial evidence in this case -- the victim's complete change in her story, the fact she reestablished a relationship with defendant after he was incarcerated -- supported an inference he prevailed on her to try to exonerate him, and provided substantial evidence to justify giving the instruction.

E. *Admission of Evidence of Defendant's Probation Status*

Defendant contends the trial court erred in admitting evidence that he was on probation. The standard of review for determining whether a trial court erred in admitting evidence is abuse of discretion: "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse. [Citation.] Abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Coddington* (2000)

23 Cal.4th 529, 587-588, overruled on other grounds in *Price v. Superior Court* (2001)

25 Cal.4th 1046, 1069, fn. 13.) Here, we discern no abuse of discretion.

As discussed previously, in the victim's 911 telephone call, she stated that defendant was on parole for domestic violence and terrorist threats. In her testimony, however, the victim explained that she had been unaware of the difference between parole and probation but had since learned that defendant had been on probation and not parole. The victim testified that the prior offenses involved his former girlfriend.

Prior to the playing of the 911 tape, defendant objected to that portion of the tape recording in which it was stated that defendant was on parole. The prosecution, however, wanted that portion of the tape to be played, with the jury to be informed that defendant was on probation rather than parole. The prosecution explained that defendant's having been previously convicted of domestic violence tended to prove that the victim believed that defendant's threat toward her was genuine.

The court noted that if it allowed evidence of defendant's prior acts of domestic violence, defendant would not be prejudiced by the jury's learning of the fact defendant was on probation. The court agreed that the victim's knowledge of defendant's prior offenses would logically tend to show that the threat made by defendant caused her to be in fear, which is an element of the offense of making a terrorist threat. After considering the matter, the trial court denied defendant's motion to redact the tape.

This ruling was within the trial court's discretion. As the court noted, the victim's knowledge that defendant was on probation for domestic violence, and therefore had

committed such a crime in the past, constitutes a reason why she would be in fear as a result of defendant's threat to kill her. Also, the fact that defendant had previously committed the offense of making a terrorist threat logically tended to show that defendant's threat to the victim was genuine.

Furthermore, as discussed in detail above, the jury heard evidence that defendant had raped Z.A., a former girlfriend. Since the jury already knew what defendant had done, the admission of the additional fact that he had been placed on probation for his conduct was not likely to be much of a revelation to the jury and unduly prejudice them against him. Therefore, the court did not err in admitting the evidence.

F. *Failure to Instruct on Lesser Included Offense*

Defendant claims the trial court erred in failing to instruct the jury on the offense of attempting to make a terrorist threat, as a lesser included offense to the charged offense of making a terrorist threat.

“A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] ‘there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense’ [citation] *but not the lesser*. [Citations.]” (*People v. Memro* (1995) 11 Cal.4th 786, 871.)

In this case, during the discussions on jury instructions, the trial court stated that it had a duty to instruct the jury on the lesser offense of attempting to make a terrorist threat. Defense counsel, however, informed the court that she did not want the court to instruct on that lesser offense. Defendant then personally waived the giving of an

instruction on that lesser offense. The People therefore argue that any error was invited by defendant. Defendant argues that the doctrine of invited error does not apply in this case. We need not address the doctrine of invited error because any alleged error was harmless.

“[I]n a noncapital case, error in failing sua sponte to instruct . . . on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*. A conviction of the charged offense may be reversed in consequence of this form of error only if, ‘after an examination of the entire cause, including the evidence’ [citation], it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred [citation].” (*People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. omitted, quoting Cal. Const., art. VI, § 13 and *People v. Watson* (1956) 46 Cal.2d 818, 836, respectively.)

In this case, as discussed, *ante*, the evidence that the victim was in sustained fear from defendant’s threat was compelling. Defendant had threatened to kill the victim, a threat that, so far as the record shows, he had not made in his past acts of domestic violence against her. She remained visibly fearful, even after law enforcement arrived. There is no reasonable likelihood that the jury would have convicted defendant of the lesser offense had it been so instructed.

G. *Cumulative Error*

Defendant contends that even if the trial court’s alleged errors, considered singularly, were not prejudicial, their cumulative effect was. We have found only one

possible error, namely, failing to instruct on attempted threat, and we have found that failure not to be prejudicial. As there are no other errors to cumulate, the cumulative error doctrine does not apply.

H. *Imposition of Upper Term*

In a supplemental brief, relying on *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*), defendant contends the trial court erred in imposing the upper term of four years on his conviction for infliction of corporal injury. He also contends the court's imposition of consecutive sentences for that conviction and his conviction for making a terrorist threat violated *Blakely*.

Penal Code section 237.5, subdivision (a) provides that a person who inflicts corporal injury on a spouse or cohabitant shall be sentenced to two, three, or four years in prison. The trial court in this case selected the upper term of four years based on its findings that (1) the crime involved violence or a threat of great bodily injury; (2) the victim was particularly vulnerable; (3) defendant threatened the victim in an attempt to dissuade her from testifying and may have suborned perjury and interfered with the judicial process; and (4) defendant took advantage of a position of trust or confidence in committing the offense.

In *Blakely, supra*, 124 S.Ct. 2531, the United States Supreme Court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi*, at p. 490; *Blakely*, at p. 2536.) In *Blakely*, the court further stated that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]” (*Blakely*, at p. 2537.) It went on to explain: “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Ibid.*)

Penal Code section 1170, subdivision (b) (section 1170(b)) provides in relevant part: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” Defendant contends that, under *Blakely*, the maximum statutory punishment in this case was the middle term of three years, because that was the most the court could impose pursuant to section 1170(b) based solely on the facts found by the jury, without additional findings of aggravating circumstances. Since the aggravating circumstances on which the court relied to exceed the middle term were neither admitted by defendant nor found true by a jury beyond a reasonable doubt, defendant concludes the imposition of the upper term violated *Blakely*.

1. *Forfeiture*¹

The People argue that defendant forfeited the right to object to his sentence based on *Blakely*, because he did not object on that basis in the trial court. The right under *Blakely* to have a jury determine any fact used to increase the statutory maximum penalty derives from the Sixth Amendment guarantee of a jury trial in criminal cases. (*Blakely*, *supra*, 124 S.Ct. at p. 2538.) The right to a jury trial is a constitutional protection “of surpassing importance” (*Apprendi*, *supra*, 530 U.S. at p. 476.)

California courts generally are reluctant to find that a fundamental constitutional right has been forfeited based on the defendant’s failure to assert the right in the trial court. In *People v. Vera* (1997) 15 Cal.4th 269, the California Supreme Court said: “Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]” (*Id.* at p. 276.) The court referred to the “constitutional right to jury trial” as such a right. (*Id.* at p. 277.)

In *People v. Saunders* (1993) 5 Cal.4th 580, the defendant claimed that discharge of the jury that convicted him, and empanelment of a new jury to decide prior conviction

¹ “[T]he terms ‘waiver’ and ‘forfeiture’ long have been used interchangeably. As the United States Supreme Court has explained, however, ‘[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the “intentional relinquishment or abandonment of a known right.” [Citations.]’ [Citation.]” (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) The People’s argument in this case is a claim of forfeiture. However, as some decisions refer to similar arguments as claims of waiver, we will sometimes use that term in discussing the relevant decisions.

allegations, violated the constitutional guarantee against double jeopardy. The California Supreme Court held the defendant did not forfeit that claim by failing to object on that basis in the trial court. The court went on to state: “Defendant’s failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial. [Citations.]” (*Id.* at p. 589, fn. 5.)

At least one California Court of Appeal has held that a failure to object at trial does *not* forfeit a claim of a right to a jury trial under *Apprendi*. In *People v. Belmares* (2003) 106 Cal.App.4th 19, the court, citing *People v. Vera, supra*, 15 Cal.4th 269, held the defendant could argue on appeal that he had a right under *Apprendi* to a jury determination of whether he was the person referred to in documents offered to prove prior convictions. The court *rejected* the People’s contention that the defendant had waived his *Apprendi* claim by failing to object when the trial court instructed the jury that defendant was the person named in the documents: “Since Belmares’s jury trial argument has, in part, a legitimate constitutional basis, we reject as to that argument the Attorney General’s waiver argument.” (*Belmares*, at p. 27.)

The People cite several federal court decisions for the proposition that a constitutional claim may be forfeited. We believe these cases are inapposite. “. . . California courts have followed the general rule that when a federal claim is brought in state court the law of the state controls on matters of practice and procedure but federal law controls on matters of substance. [Citations.]” (*County of Los Angeles v. Superior Court* (2000) 78 Cal.App.4th 212, 230.) The United States Supreme Court

likewise has recognized that “it is normally ‘within the power of the State to regulate procedures under which its laws are carried out’” (*Patterson v. New York* (1977) 432 U.S. 197, 201 [97 S.Ct. 2319, 53 L.Ed.2d 281].) The issue of whether a federal claim has been adequately preserved for appeal in a state court is a procedural matter and therefore should be governed by state law. As discussed *ante*, California case law does not support a finding of forfeiture in this case.

In any event, the federal decisions the People cite fail to persuade us that defendant’s *Blakely* claim should be deemed to be forfeited in this case. *U. S. v. Olano* (1993) 507 U.S. 725 [113 S.Ct. 1770, 123 L.Ed.2d 508] did not concern the constitutional right to a jury trial. *Olano* held the defendant had forfeited a claim that it was error to let alternate jurors attend deliberations by not objecting when the deliberations took place. Significantly for purposes of this case, the Supreme Court expressly recognized that some constitutional rights may not be subject to waiver: “Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake. [Citations.]” (*Id.* at p. 733.)

The court in *U.S. v. Cotton* (2002) 535 U.S. 625 [122 S.Ct. 1781] concluded that an *Apprendi* claim can be forfeited, but the case did not concern the right under *Apprendi* to a jury determination of facts used to increase the maximum punishment. In *Cotton*, the federal district court made drug quantity findings that exposed the defendants to greater

punishment, which the court then imposed. On appeal, the defendants argued their sentences were invalid under *Apprendi* because the issue of drug quantity was neither alleged in the indictment nor submitted to the jury.

In holding that the claim had been forfeited, the United States Supreme Court limited its discussion of *Apprendi* to the adequacy of the indictment. It did not discuss whether the defendants waived their *additional* claim that the issue of quantity should have been submitted to the jury. In fact, the court described the question to be addressed as “whether the *omission from a federal indictment* of a fact that enhances the statutory maximum sentence justifies a court of appeals’ vacating the enhanced sentence, even though the defendant did not object in the trial court.” (*U.S. v. Cotton, supra*, 535 U.S. at p. 627, italics added.)

In *U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, the defendant claimed the district court violated *Blakely* by determining, without a jury, that his offense involved a sufficient quantity of drugs for an enhanced sentence. The Court of Appeals reviewed the claim under the plain error doctrine, the standard applicable in federal court to the review of a claim not raised in the trial court. However, the court did not actually say the claim had been forfeited, nor did it indicate the government had argued forfeiture. Instead, the court simply stated it would consider the claim sua sponte, because *Blakely* had “worked a sea change in the body of sentencing law,” and because of “the Sixth Amendment implications of *Blakely*” (*Ameline*, at pp. 973-974, fn. omitted; see also *id.* at pp. 978-979.)

Given the importance of the constitutional right to a jury trial, “California law has long required that waiver of a jury trial be express. [Citation.]” (*In re Tahl* (1969) 1 Cal.3d 122, 129, fn. 4.) A reviewing court therefore should not find that a claim based on the right to a jury trial has been *implicitly* forfeited by mere inaction unless there is no substantial doubt about the matter. In view of the decisions discussed *ante*, we cannot conclude, at least without further guidance, that the California Supreme Court would hold a *Blakely* claim is forfeited by failure to object on that basis in the trial court. Accordingly, we reject the People’s claim of forfeiture.

2. *Application of Blakely*

We turn now to the merits of defendant’s *Blakely* claim. The question presented by that claim is this: Under California’s Determinate Sentencing Act (DSA; § 1170 et seq.) should the “statutory maximum,” which under *Blakely* cannot be exceeded without jury findings, be deemed to be the upper term stated in the statute prescribing the punishment for the crime, or the statutory middle term, which section 1170(b) says shall be given unless the court finds aggravating or mitigating circumstances? Put another way, should the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant” (*Blakely, supra*, 124 S.Ct. at p. 2537, italics omitted) be deemed to be the upper term, on the theory that once a defendant is convicted, he becomes eligible for any of the three terms stated in the penalty statute, or the middle term, on the theory that a conviction alone does not allow the court to find the aggravating circumstances that are necessary to impose the upper term?

Blakely does not provide a direct answer to this question. *Blakely* dealt not with an upper term -- i.e., a term at the high end of the range set forth in the statute delineating the punishment for the crime -- but with an “exceptional sentence” (90 months) that *exceeded* the high end of the statutory range of 49 to 53 months. Thus, the sentencing provision declared unconstitutional in *Blakely* operated like an enhancement, not an upper term, under the DSA. Unlike an enhancement in California, the exceptional sentence in *Blakely* could be imposed based on the judge’s unilateral findings of facts, with no jury determination or admission by the defendant of those facts.

Accordingly, to determine how *Blakely* affects the validity of an upper term under the DSA, one must consider the Washington sentencing scheme under which *Blakely* arose. One must then consider, interpreting *Blakely* in that context, how its holding should be applied to the DSA.²

² The California Supreme Court is currently considering whether an upper term imposed without a jury finding of aggravating circumstances is unconstitutional under *Blakely*. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) In the interim, California Court of Appeal decisions have gone both ways on the issue. To date, all of those decisions either have been accepted for review or are still subject to being reviewed. In view of the Supreme Court’s pending consideration of the issue, it would not be profitable to address the Court of Appeal decisions specifically.

a. *Washington sentencing law*³

In Washington, the penalty for a crime that is to be punished with a determinate sentence is determined by computing a “standard range” based on the seriousness of the crime (seriousness level) and the defendant’s prior criminal record (offender score). The seriousness level is determined from a table assigning a number to each crime, which may vary from a low of I for offenses such as forgery to a high of XVI for aggravated first degree murder. (Wash. Rev. Code § 9.94A.515.) The offender score is determined by assigning a point value to each of the defendant’s prior convictions based on its seriousness and then totaling the points for all of the prior convictions. (Wash. Rev. Code § 9.94A.525.)

The seriousness level and offender score are then applied to the horizontal and vertical axes of a sentencing grid. The intersection of the two numbers on the grid yields a standard range extending from the lowest to the highest term that may be imposed for the offense and a sentencing midpoint between the lowest and highest terms. (Wash. Rev. Code § 9.94A.510, § 9.94A.530.)⁴

³ For ease of reference, we use the current versions of the Washington statutes. The Supreme Court in *Blakely* used the versions that were in effect when the defendant in that case was sentenced, October 2000. (*Blakely, supra*, 124 S.Ct. at p. 2534, fn. 1; see *State v. Blakely* (2002) 111 Wash.App. 851, 860 [47 P.3d 149, 154].) The current versions are not different from the versions considered in *Blakely* in any way that would affect our analysis.

⁴ *Blakely* stated that the defendant in that case had a seriousness level of V and an offender score of two, which made the standard range 13 to 17 months. This was increased to 49 to 53 months, because the defendant also was subject to a firearm

[footnote continued on next page]

Normally, the court is to impose a sentence within the standard range. (Wash. Rev. Code § 9A.04.505(2)(a)(i).) However, the court may impose a sentence outside the range if it finds there are substantial and compelling reasons justifying an “exceptional sentence.” (Wash. Rev. Code § 9.94A.535.) It was this provision, allowing the court to exceed the standard range based on findings it had made independently of the jury, that *Blakely* held violated the Sixth Amendment.

In choosing a sentence within the standard range, a Washington court “shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.” (Wash. Rev. Code § 9.94A.500(1).) Furthermore, the court may rely on information “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports.” (Wash. Rev. Code § 9.94A.530(2).)

At the sentencing hearing, which the court must conduct before imposing sentence (Wash. Rev. Code § 9.94A.500(1)), each party may argue factual matters in support of a sentence at one or the other end of the standard range. (See, e.g., *State v. Williams* (2000)

[footnote continued from previous page]

enhancement of 36 months. (*Blakely, supra*, 124 S.Ct. at p. 2535.) Although the court did not say so, the midpoint for a 13- to 17-month standard range was 15 months, which would have yielded a midpoint of 51 months for the 49- to 53-month range. (See Notes foll. Wash. Rev. Code § 9.94A.510.)

103 Wash.App. 231, 238 [11 P.2d 878] [prosecutor argued that protection of the community required a sentence of at least the high end of the standard range].) Thus, “a prosecutor may reference a defendant’s prior bad acts in support of an argument that the sentencing judge should impose the maximum standard range sentence.” (*Ibid.*; accord, *State v. Van Buren* (2000) 101 Wash.App. 206, 216 [2 P.3d 991].)

b. *Interpretation of Blakely in the context of Washington sentencing law*

It is apparent from the foregoing discussion that a Washington judge in selecting a sentence within a 49- to 53-month standard range would *not* literally be imposing a sentence “*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely, supra*, 124 S.Ct. at p. 2537.) Instead, the judge would be imposing a sentence on the basis of the jury verdict or the defendant’s admissions *plus* the information presented in the presentence reports; the statements of counsel, the defendant, the victim, and the law enforcement officer at the sentencing hearing; and any other information proved at the trial or sentencing hearing. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).)

Requiring a court to consider these sources of information necessarily means the court must be authorized to make factual determinations based on the information. Otherwise, the court could not determine whether the information it is bound by statute to consider is credible or relevant, or whether it supports a sentence at one or the other end of the standard range. It must be presumed that the Washington legislature would not

require a court to hold a hearing, consider the evidence presented at the hearing, and then make no meaningful use of the information obtained because it could not make the factual determinations necessary to do so.

Notably, the Washington legislature in enacting the state's determinate sentencing law expressly disclaimed any intent to eliminate judicial discretion from the sentencing process. The legislature stated it wanted to create a sentencing system "which structures, but does not eliminate, discretionary decisions affecting sentences" (Wash. Rev. Code § 9.94A.110.) A grant of judicial discretion implies the authority to make factual determinations to the degree necessary to reach an informed decision. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, quoting *People v. Surplice* (1952) 203 Cal.App.2d 784, 791.)

A fair reading of the Washington sentencing law therefore supports the conclusion that a judge in choosing a sentence from a range of 49 to 53 months must have authority to determine facts in addition to those "reflected in the jury verdict or admitted by the defendant." (*Blakely, supra*, 124 S.Ct. at p. 2537, italics omitted.) A typical jury verdict or guilty plea does no more than establish the defendant's guilt of the specified offense. That finding would *establish* the range of, say, 49 to 53 months, but it would provide no guidance in *choosing* within the range. Precluding the judge from making any further fact determinations would result in a choice of sentence that would be no more than arbitrary, a result antithetical to the proper exercise of discretion. (*In re Cortez, supra*, 6

Cal.3d at p. 85 [“‘[t]he term [judicial discretion] implies absence of arbitrary determination, capricious disposition or whimsical thinking’”])

The Supreme Court in *Blakely* did not suggest there was any constitutional infirmity in allowing the judge to select a sentence within the 49- to 53-month range. On the contrary, the court made clear that it would have been constitutional for the trial judge to have imposed the high term of 53 months without additional jury findings. As noted, the court defined the “statutory maximum” for *Apprendi* purposes to be “the maximum [the judge] may impose *without* any additional findings.” (*Blakely, supra*, 124 S.Ct. at p. 2537.) The court further made clear that the “statutory maximum” in *Blakely*’s case was the 53-month high term: “In this case, petitioner was sentenced to more than three years above the *53-month statutory maximum* of the standard range because he had acted with ‘deliberate cruelty.’” (*Ibid.*, italics added.)

As a matter of logic, if the “statutory maximum” is the maximum sentence a judge may impose “*without* any additional findings” and the “statutory maximum” for *Blakely*’s crime was 53 months, it follows that the trial judge in *Blakely* could have imposed 53 months *without* additional jury findings, without violating *Apprendi* or *Blakely*. The constitutional problem arose only when the judge imposed *more* than 53 months without additional jury findings.

The *Blakely* court demonstrated its familiarity with the Washington sentencing statutes by citing them extensively. (*Blakely, supra*, 124 S.Ct. at p. 2535.) It presumably knew those statutes required a court in selecting a sentence within the standard range to

consider information *besides* the facts found by the jury or admitted by the defendant. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).) It presumably also recognized that a court could not effectively consider that information if it was precluded from making any further factual determinations.

The *Blakely* court also presumably knew that in many cases, the statutory range available to the sentencing judge would be far greater than the 49- to-53-month range in *Blakely*. For example, in the case of an offender with a seriousness level of XV and an offender score of nine or more, the range would be 411 to 548 months, i.e., 34 years 3 months to 45 years 8 months. (Wash. Rev. Code § 9.94A.510.) Yet, if there is no constitutional infirmity in a judge choosing a sentence within the range of 49 and 53 months without jury findings, then by the same token there should be no infirmity in a judge choosing a sentence within a greater range without such findings. If that is true, then the conclusion that the judge must be authorized to make factual findings in choosing a sentence within the range becomes virtually inescapable. It cannot reasonably be suggested that a judge could meaningfully choose between 34 years 3 months and 45 years 8 months -- a difference of more than 11 years -- but make no factual findings on which to base the choice.

Blakely's statements that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" and that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the

maximum he may impose *without* any additional findings” (*Blakely, supra*, 124 S. Ct. at p. 2537) must be interpreted in this context. That context must include the fact that the court identified no Sixth Amendment violation in the fact a Washington judge could give a sentence of 53 months without jury findings. Viewing the statements in that manner, one can derive these principles of law from *Blakely*:

1. Judicial factfinding in the determination of an appropriate sentence is not per se unconstitutional.

2. Under a determinate sentencing system that provides for a range of sentences rather than a single sentence for a given offense, it is not unconstitutional for the legislature to authorize the judge to make factual determinations that are used to select a sentence within the range, including the highest term in the range.

3. It *is* unconstitutional for the legislature to authorize the judge to make factual determinations that are used to impose a sentence *exceeding* the highest term of the statutory range. Facts that are used for that purpose must be found by the jury or admitted by the defendant.

We discuss next how these principles should be applied to sentencing in California.

c. *Application of Blakely to California sentencing law*

As noted, section 1170(b) provides: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the

crime.” Section 1170(b) goes on to provide: “In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer’s report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.”

Section 1170(b)’s description of the materials a judge may consider in deciding whether to impose an upper or lower term is notably similar to the description in Washington’s sentencing law of the materials a judge is to consider in selecting a term within the standard range. As shown *ante*, the Washington law provides that the court shall consider presentence reports; victim impact statements; arguments from counsel, the defendant, the victim or his or her representative, and an investigative law enforcement officer; and any information proved at trial or at the time of sentencing. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).)

As seen *ante*, the Washington system implicitly contemplates a sentencing court may make factual determinations based on its consideration of the materials referred to in the statute. Based on those factual determinations, the court can select any term within the standard sentencing range, including the high term.

California merely makes explicit what is implicit in Washington. Section 1170(b) says the judge can give the upper term by finding aggravating circumstances, and in finding such circumstances can consider the factual materials referred to in the statute.

Washington's law implicitly says the same thing -- the judge may sentence within the standard range after considering the factual materials referred to in the Washington statute and, by necessary implication, making fact findings to support a higher or lower sentence within that range. If a 53-month sentence in *Blakely* would not offend the Sixth Amendment, neither should an upper term under the DSA.

The only overt difference between the California and Washington systems is that section 1170(b) contains an explicit directive that the middle term be given unless the judge makes additional findings to justify a departure from it. Defendant seizes upon that directive to argue that under *Blakely*'s statement that the "statutory maximum" for *Apprendi* purposes is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings" (*Blakely, supra*, 124 S.Ct. at p. 2537), the statutory maximum in California must be deemed to be the middle term, not the upper term.

We believe, however, that *Blakely*'s statement should be understood according to the context in which it was stated -- a case in which the court did not give what would be the equivalent of an upper term under the DSA, but exceeded that term to impose almost double the upper term. We do not for that reason believe that, if it were to consider California's sentencing system, the *Blakely* court would apply its definition literally to find unconstitutional the statutory authority of a court to give the upper term if it finds aggravating circumstances. Rather, we believe, the court would find unconstitutional only a term *exceeding* the upper term without supporting jury findings.

Accordingly, as we read *Blakely*, “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*” (*Blakely, supra*, 124 S.Ct. at p. 2537) should be taken to mean the maximum term of the sentencing range the legislature has chosen for that offense. Otherwise, there would have been no basis in *Blakely* for giving any sentence other than 49 months, because the judge would have been precluded from making any factual determination that would justify giving 53 months or any other sentence exceeding 49.

Even if we are wrong, and the *Blakely* court would say that section 1170(b)’s directive renders unconstitutional an upper term imposed without jury findings, the constitutional problem could be instantly eliminated by the simple expedient of deleting the middle term directive from the statute. Then, a sentencing range under the DSA would become an exact analog of the 49- to 53-month range in *Blakely*, with which, we again emphasize, *Blakely* found no constitutional problem.

Taking that simple expedient would serve no salutary objective that should, in right or in law, justify conferring the imprimatur of constitutionality on a sentence that previously lacked it. The potential for arbitrariness in sentencing would increase, not decrease, because the court could now give an upper or lower term without any factual findings at all. Such a result would in no way advance any Sixth Amendment goal. We cannot believe the *Blakely* court would intend that result.

The only part of the sentence in *Blakely* that the court held presented a constitutional problem was the judge’s imposition of an “exceptional” sentence of 90

months. *Blakely* held the judge could not exceed the 49- to 53-month range imposed by the statute that specified the range of punishment for the offense based on his own finding that the defendant acted with deliberate cruelty. The exceptional sentence was based on a separate statute providing for a higher sentence if the court made the cruelty finding.

In this case, the four-year term defendant received for the corporal injury count was within the two- to-four-year range imposed by the statute that specified the standard range of punishment for the offense, Penal Code section 273.5, subdivision (a). The court did not exceed that range by imposing more time under a separate statute, as the judge in *Blakely* did. The four-year term therefore is not analogous to the 90-month term that the court found unconstitutional in *Blakely*. Rather, it is analogous to the 53-month high end of the standard range in *Blakely*, which the court never suggested might pose any constitutional problem.

The appropriate California analog for the additional 37 months by which the 90-month exceptional sentence in *Blakely* exceeded the 53-month high end of the standard range is a sentence enhancement. An enhancement, like the exceptional sentence in *Blakely*, increases the sentence *beyond* the standard range of lower, middle, and upper terms set forth in the statute specifying the punishment for the offense. Under *Blakely*, a fact used to impose an exceptional sentence must be admitted by the defendant or found to be true by a jury. The same is true of an enhancement in California. (Pen. Code, § 1170.1, subd. (e).)

Blakely itself referred to the type of sentence term it determined to be unconstitutional -- one that causes the overall sentence to exceed the statutory maximum -- as an “enhancement.” The court said that a judge in Washington cannot impose an exceptional sentence “without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence *enhancement* or merely *allow* it, the verdict alone does not authorize the sentence.” (*Blakely, supra*, 124 S.Ct. at p. 2538, fn. 8, second italics added.)

The court again referred to the excessive portion of an unconstitutional sentence as an “enhancement” when it discussed the appropriate procedure when a defendant pleads guilty: “When a defendant pleads guilty, the State is free to seek judicial *sentence enhancements* so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. . . . Even a defendant who stands trial may consent to judicial factfinding as to sentence *enhancements*, which may well be in his interest if relevant evidence would prejudice him at trial.” (*Blakely, supra*, 124 S.Ct. at p. 2541, italics added.)

Though it did not use the term “enhancement,” the *Blakely* court’s comparison of determinate and indeterminate sentencing systems also supports the conclusion that the type of sentence term *Blakely* found unconstitutional is analogous to a California sentence enhancement rather than an upper term. *Blakely* acknowledged that indeterminate sentencing systems “involve judicial factfinding,” since a judge “may implicitly rule on those facts he deems important to the exercise of his sentencing

discretion.” (*Blakely, supra*, 124 S.Ct. at p. 2540.) However, the court explained why that kind of judicial factfinding is permissible, but factfinding that yields a penalty exceeding the statutory maximum is not: “In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.” (*Ibid.*)

An upper term under the DSA operates like the 40-year term referred to in the first system described in *Blakely*’s example. An offender, like defendant in this case, who inflicts corporal injury on a spouse or cohabitant “knows he is risking” four years in prison, because Penal Code section 237.5, subdivision (a), the statute prescribing the punishment for the offense, says four years is the maximum sentence for that crime. By the same token, a defendant who commits that offense while unarmed is “entitled” to a sentence of no more than four years, since he is not subject to a firearm enhancement. (See Pen. Code, §§ 12022, 12022.5.)

Why, then, are indeterminate sentencing systems constitutional under *Blakely* even though the court acknowledged that they “involve judicial factfinding”? (*Blakely, supra*, 124 S.Ct. at p. 2540.) *Blakely*’s answer is that the judicial factfinding under such a system only permits a judge to “implicitly rule on those facts he deems important to the exercise of his sentencing discretion.” (*Ibid.*) If that is the relevant criterion, an upper

term under the DSA should be constitutional too. Findings of aggravating circumstances also consist of a judge ruling “on those facts he deems important to the exercise of his sentencing discretion” within the range set forth in the statute prescribing the punishment. They do not operate to remove the upper term limit and make available a much greater sentence, as the finding of deliberate cruelty did in *Blakely*. That function is served by enhancements, not upper terms.

Decisions of the California Supreme Court also support the conclusion that the type of sentence *Blakely* found unconstitutional is analogous to an enhancement, not an upper term, under the DSA. Although that court has not yet addressed the application of *Blakely* to sentencing under the DSA, it has on several occasions considered the application of *Apprendi*. The court has consistently read *Apprendi* to apply to enhancements, not to upper terms.

In one recent decision, the court said: “This is what *Apprendi* teaches us: [T]he federal Constitution requires a jury to find, beyond a reasonable doubt, the existence of every element of a *sentence enhancement* that increases the penalty for a crime beyond the ‘prescribed statutory maximum’ punishment for that crime. [Citation.]” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, italics added.)

Two years later, the court made explicit that it considered the “statutory maximum” sentence for *Apprendi* purposes -- the sentence a court cannot exceed without a jury finding -- to be the upper term. The defendant in *In re Varnell* (2003) 30 Cal.4th 1132 received 16 months for violating Health and Safety Code section 11377,

subdivision (a), a crime punishable by 16 months, two years, or three years. (Health & Saf. Code, § 11377, subd. (a); Pen. Code, § 18.) The defendant argued the court improperly relied on a prior conviction to find him ineligible for alternative drug offender treatment. Rejecting the argument, the Supreme Court stated: “. . . *Apprendi, supra*, 530 U.S. 466, holds that any fact that increases the penalty for a crime beyond the statutory maximum prescribed for that crime must be submitted to a jury and proved beyond a reasonable doubt. [Citations.] Here, since *the statutory maximum for petitioner’s crime is three years* in prison [citation], no finding by the trial court *increased* the penalty beyond the statutory maximum. [Citation.]” (*Varnell*, at pp. 1141-1142, second italics added.)

If the “statutory maximum” for *Apprendi* purposes is the upper term, the same should be true for purposes of *Blakely*. *Blakely* did not purport to alter any principles expressed in *Apprendi*. The *Blakely* court, in fact, began its legal discussion by saying, “This case requires us to *apply the rule* we expressed in *Apprendi*” (*Blakely, supra*, 124 S.Ct. at p. 2536, first italics added.) Here, then, the “statutory maximum” for purposes of *Blakely* should be deemed to be the upper term of four years, not the middle term of three years, just as the statutory maximum in *In re Varnell* was the upper term of three years and not the middle term of two years. That being the case, imposition of the upper term does not violate *Blakely*.

3. *Consecutive terms*

In addition to the upper term of four years on the corporal injury count, defendant's sentence included a consecutive term of eight months for the terrorist threat count. Defendant contends the consecutive term was unconstitutional under *Blakely*, because the factors the court relied upon to impose consecutive sentencing were not found true by a jury beyond a reasonable doubt or admitted by defendant.

A court is generally required to state a reason for imposing consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5).)⁵ The court in this case did not do so. It could not rely on any fact it used to impose the upper term on the corporal injury count. (Rule 4.425(b).) It is not clear what additional facts the court may have relied on in imposing consecutive terms. For purposes of argument, we will assume the court may have relied on some fact that, under *Apprendi* and *Blakely*, would have to be found by a jury if it were used to exceed the maximum statutory punishment. If that assumption is made, the issue becomes whether, under *Apprendi* and *Blakely*, a fact used to impose consecutive sentences must be found by a jury.

Neither *Apprendi* nor *Blakely* addressed that issue. Several post-*Blakely* California Court of Appeal decisions have considered the issue, and the issue is now under review in the Supreme Court. (See, e.g., *People v. Black*, *supra*, review granted July 28, 2004, S126182, and subsequent related cases granted review.) However, as with

⁵ All further references to rules are to the California Rules of Court unless otherwise stated.

the issue of the validity of upper terms under *Blakely*, the post-*Blakely* decisions addressing the validity of consecutive sentencing either have been accepted for review or are still subject to being reviewed. There is, however, a decision addressing the issue under *Apprendi*, before *Blakely* was decided.

In *People v. Groves* (2003) 107 Cal.App.4th 1227, the trial court imposed consecutive terms for two counts of forcible oral copulation pursuant to Penal Code section 667.6, based on its finding that the oral copulations occurred on separate occasions. (See rule 4.425(a)(1).) The defendant argued “that the imposition of these two consecutive terms without a jury finding that the offenses occurred on separate occasions violated his federal constitutional rights to a jury trial and to due process. [Citations.]” (*Groves*, at p. 1230, fn. omitted.)

The court held the imposition of consecutive terms under Penal Code section 667.6 “does not constitute an increase in the maximum possible sentence.” (*People v. Groves, supra*, 107 Cal.App.4th at p. 1231.) Therefore, due process did not require that the finding of separate occasions be made beyond a reasonable doubt, and *Apprendi* did not require that the finding be made by a jury rather than the trial court. (*Groves*, at pp. 1231-1232.)

People v. Cleveland (2001) 87 Cal.App.4th 263, considered a closely analogous issue. The defendant received consecutive sentences for attempted murder and robbery of the same victim. The court refused to stay the robbery sentence under Penal Code section 654, finding that the defendant had separate intents and objectives in committing

the robbery and the attempted murder. The defendant argued that under *Apprendi* a jury, not the court, had to determine whether he acted with separate intents and objectives.

The Court of Appeal rejected the argument, holding that the trial court's finding of separate intents and objectives did not *increase* the maximum statutory sentence for either crime. Rather, the finding only determined that the court would impose a separate sentence for each crime *within* the statutory range for that crime. Therefore, the finding did not have to be made by a jury under *Apprendi*. (*People v. Cleveland, supra*, 87 Cal.App.4th at pp. 269-271.)

As noted *ante*, the *Blakely* court made clear that its intent was to “apply” the rule it had already expressed in *Apprendi*, not to change it. (*Blakely, supra*, 124 S.Ct. at p. 2536.) The holdings of the *Cleveland* and *Groves* courts that the facts on which consecutive or separate terms are based do not have to be found by a jury beyond a reasonable doubt under *Apprendi* therefore apply equally under *Blakely*. Accordingly, *Cleveland* and *Groves* support the rejection of defendant's *Blakely* challenge.

Defendant argues that concurrent sentencing is the presumptive norm unless the sentencing court finds the existence of facts supporting consecutive sentences. Therefore, he asserts, the relevant statutory maximum sentence for *Apprendi* and *Blakely* purposes is a concurrent sentence, and a court should not be able to exceed that sentence unless facts supporting consecutive sentences have been found by a jury or admitted by the defendant.

The argument fails. There is no statutory provision making concurrent sentencing the presumptive norm. As the court explained in *People v. Reeder* (1984) 152 Cal.App.3d 900: “While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing. [Citations.]” (*Id.* at p. 923.)

4. *Conclusion*

For these reasons, we conclude *Blakely* does not prohibit a California court from imposing an upper term, or from imposing consecutive terms, under the DSA based on facts not found by a jury or admitted by the defendant. Accordingly, sentencing defendant to four years and imposing consecutive terms was not unconstitutional under *Blakely*.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI

Acting, P.J.

I concur:

KING

J.

WARD, J., Concurring and Dissenting:

I concur with the majority's decisions except for its conclusion that the imposition of the upper term of four years on the conviction for infliction of corporal injury by the trial court did not violate the decision in *Blakely v. Washington* (2004) ___ U.S. ___, 124 S.Ct., 2531 (*Blakely*). I dissent from that conclusion.

In this case, the trial court relied on four aggravating factors as the basis for its decision to impose the upper term under Penal Code section 237.5, subdivision (a), inflicting corporal injury on a spouse or cohabitant: (1) violence, threat of great bodily injury, a high degree of cruelty or viciousness; (2) the victim's vulnerability, based on her smaller size, weakness compared to defendant, and her pregnancy; (3) defendant's threatening the victim, attempting to dissuade her from testimony, possibly suborning perjury on her behalf, and interfering with the judicial process; and (4) taking advantage of a position of trust or confidence in committing the offense. Under *Blakely*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 124 S.Ct. at p. 2536, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) Therefore, the consideration of the facts summarized above to enhance the sentence violates defendant's Sixth

Amendment rights; as a result, the sentence is invalid. (*Blakely, supra*, 124 S.Ct. at pp. 2537-2538.)

The majority, however, concludes that “*Blakely* does not prohibit a California court from imposing an upper term, [] under the DSA based on facts not found by a jury or admitted by the defendant.” {Maj. Opn. p. 47} The majority opinion is based upon its interpretation of the meaning of “prescribed statutory maximum term.” The Supreme Court refers to that concept in *Apprendi, supra*, 530 U.S. 466. There the court said that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, at p. 490, italics added.) For the following reasons, I believe that the majority has erred in its conclusion as to the meaning of the term “statutory maximum.” As a result, the majority erroneously affirms the trial court decision to aggravate the defendant’s sentence without submitting the issue to a jury.

Penal Code section 1170, subdivision (b) provides that “[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” California Rules of Court, rule 4.420 directs the trial judge to select the middle term of imprisonment unless imposition of the upper term is justified by circumstances in aggravation, established by a

preponderance of the evidence. In this case, Penal Code section 237.5, subdivision (a) provided for sentences of two, three, or four years. Based upon section 1170, subdivision (b), the majority finds, without apparent authority, that the “statutory maximum” in this case is four years and that the trial court could impose the aggravated four-year sentence without submitting the issue to a jury.

In *Blakely, supra*, Justice Scalia referred to the admonition of *Apprendi, supra*, that “. . . any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” As Justice Scalia noted “[t]his rule reflects two longstanding tenets of common-law criminal jurisprudence: that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’ 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)” (*Blakely, supra*, 124 S.Ct. at p. 2536.)

In *Harris v. U.S.* (2002) 536 U.S. 545, 122 S.Ct. 2406, the Supreme Court concluded that the legislature “may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.” (*Id.* at p. 557.) Those constitutional safeguards apply to facts that were “traditional elements” of a crime even though the legislature may label those elements as mere sentencing factors. An element of the crime, which requires submission to a jury, is a fact “legally essential to the

punishment to be inflicted.” (*United States v. Reese* (1875) 92 U.S. 214, 232, 23 L.Ed. 563.)

In this case, the trial court sentenced defendant to the aggravated term based upon its finding by a preponderance of the evidence. The majority nevertheless affirms that decision because it defines the statutory maximum to be the upper term of the three terms authorized by Penal Code section 1170, subdivision (b). That definition, however, ignores Justice Scalia’s caveat that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.” (*Blakely, supra*, 124 S.Ct at p. 2537.)

In this case, the trial court increased the penalty for the charged crime by considering factors never submitted to a jury. As provided above, the trial court, not the jury, found the following factors justified the imposition of the upper term: (1) violence, threat of great bodily injury, a high degree of cruelty or viciousness; (2) the victim’s vulnerability, based on her smaller size, weakness compared to defendant, and her pregnancy; (3) defendant’s threatening the victim, attempting to dissuade her from testimony, possibly suborning perjury on her behalf, and interfering with the judicial process; and (4) taking advantage of a position of trust

or confidence in committing the offense. As Justice Scalia noted in his concurring opinion in *Apprendi*, the right to trial by jury guarantees “the right to have a jury determine those facts that determine the maximum sentence the law allows.”

(*Apprendi, supra*, 530 U.S. at p. 499, 120 S.Ct. 2348.)

Here, the factors considered by the court in imposing the aggravated term were neither charged in the information nor found by a jury. Moreover, the People cannot contend that those factors were mere sentencing factors and not elements of the crime on which the penalty was based. In *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 243, 118 S.Ct. 1219, Justice Breyer found that recidivism is a traditional sentencing factor not requiring inclusion in the information nor submittal to a jury. That is not the situation here. The viciousness of a crime, the vulnerability of the victim, defendant threatening the victim, and defendant taking advantage of a position of trust are factors that go beyond mere sentencing factors. The trial judge must impose “a specific sentence *within the* range authorized by the jury’s finding that the defendant [was] guilty.” (*Harris v. U.S., supra*, 536 U.S. at p. 564, quoting from *Apprendi, supra*, at p. 494, n. 19, 120 S.Ct. 2348, original italics.)

The factors found by the trial court to support the aggravated sentence were elements of the crime, not mere sentencing factors. Those factors were not determined by the jury, and hence, they violate the Supreme Court’s admonition “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a

judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely, supra*, 124 S.Ct at p. 2537.) In effect, the majority’s decision reduces the elements of defendant’s crime to mere sentencing factors, thereby allowing imposition of a substantial increase in the defendant’s sentence. A defendant’s right to a jury decision on the facts relied upon to aggravate his sentence is too significant to relegate to a mere “sentencing” decision by a trial court relying upon its own finding by a preponderance of the evidence.

I would remand the case for resentencing.

/s/ Ward

J.